UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **BERNADEAN WEISS**, Debtor.	Case No. **04-62792-13**

MEMORANDUM OF DECISION

At Butte in said District this 26th day of January, 2005.

Pending in this Chapter 13 case are the Trustee's two (2) motions to convert this case to Chapter 7 filed November 10, 2004, and November 29, 2004; and the motion to convert or dismiss and motion to modify stay filed by creditor Bank of the Rockies, N.A. (hereinafter the "Bank") on November 15, 2004. The Debtor filed objections to the Trustee's and Bank's motions, and hearing on these matters was held after due notice at Great Falls on December 16, 2004, at the conclusion of which the Court took all matters under advisement. After review of the record and applicable law, for the reasons set forth below the motions to convert are granted and this case is converted to a case under Chapter 7. In addition the Bank's motion to modify stay is granted and the stay is modified to authorize the Bank to proceed with foreclosure of its collateral under applicable nonbankruptcy law, provided that the Chapter 7 Trustee appointed in this case shall have ten (10) days to request a hearing and relief.

This Court has original and exclusive jurisdiction over this Chapter 13 bankruptcy case under 28 U.S.C. § 1334(a). The Trustee's motions to convert and the Bank's motions to dismiss or convert and to modify stay both are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (G).

At the hearing on December 16, 2004, the Debtor Bernadean Weiss ("Bernadean") appeared and testified, represented by attorney R. Clifton Caughron. The Chapter 13 Trustee Robert G. Drummond filed a consent to the Bank's motion to modify stay and appeared in support of both of his motions to convert. The Bank was represented by attorney Joel P. Guthals ("Guthals"), and the Bank's president Michael E. Grove ("Grove") testified. The Bank's Exhibits ("Ex.") A, B, C, D, and Trustee's Ex. A, C, D, E and H, all were admitted into evidence without objection. At the conclusion of the parties' cases-in-chief the Court closed the record and took all matters under advisement. The Court has reviewed the record and applicable law. These matters are ready for decision. This memorandum contains this Court's findings of fact and conclusions of law.

FACTS

Bernadean is a retired school teacher who moved from Burlingame, California, to Colorado in May 1994. Also in May of 1994, Bernadean purchased a house and real property located at 52 Miller Road White Sulphur Springs, Meagher County, Montana, where she and her son Roy Shaun McCarty ("Roy") live with his family and where Roy operates a bed and breakfast business known as the "Foxwood Inn"[1]. Bernadean bought the Foxwood Inn on May

[1]The complete legal description from Ex. B, the deed of trust, is: "Beginning at the Southeast corner of the Southwest Quarter of the Northwest Quarter of Section 13, Township 9 North, Range 6 East, M.P.M., Meagher County, Montana, being a point of the County road, running thence North along the East boundary of said SW1/4NW1/4 a distance of 440 feet; thence West a distance of 240 feet; thence South a distance of 440 feet; thence East along a South boundary of said SW1/4NW1/4 a distance of 240 feet to the place of beginning." There are slight differences between this legal description and other legal descriptions on quitclaim deeds in the record purporting to cover the same property. The deed of trust description is the same as the description on the Bank's motion to modify stay at paragraph 2(c). In this Memorandum of Decision the property described will be referred to as the "Foxwood Inn".

26, 1994, for $175,000 cash from sellers David L. Daly and Norma A. Daly who executed a warranty deed, Trustee's Ex. C, conveying the property to Bernadean who recorded the deed the same date. She built a 2-car garage on the property in 1994, for $15,000.

Bernadean testified that she claims the income from the Foxwood Inn on her tax returns, but that her son operates the bed and breakfast business, and she gives him complete control over the business. No written agreement exists between Bernadean and Roy for his operation of the bed and breakfast, just a verbal oral understanding that Roy runs the business by maintaining the buildings, cooks breakfast along with his wife, checks people in and out, and takes care of the bills. Bernadean testified that she owns the bed and breakfast, but never intended to live at the Foxwood Inn. She thought it would be profitable and started the bed and breakfast to give Roy a place to work and a source of income, and eventually to buy the business from her. She testified that Roy does not draw a salary from the Foxwood Inn, but that he manages the money of the business. The Foxwood Inn bed and breakfast is not a profitable business, according to Bernadean, and its business is seasonal. She testified that Roy is employable and able to work except that he suffers from migraines. In addition to running the bed and breakfast, Roy works as a fishing outfitter/shuttle service. Bernadean testified that she is supporting Roy and his family "in part".

On February 8, 1999, Bernadean signed a quitclaim deed, Trustee's Ex. D, conveying the Foxwood Inn to Roy for "good consideration and for the sum of ($1.00) paid by the second party." That quitclaim deed was recorded on February 8, 1999. Under examination by Bank's counsel Guthals, Bernadean testified that the quitclaim deed was not a gift to Roy. She testified that she conveyed the property to Roy because he had gone to Russia for the purpose of finding a

wife, that he was attempting to meet the legal requirements for bringing a wife back to the United States, and needed to provide proof to the United States embassy in Russia that he had the means to support a wife. Bernadean testified that their agreement was she would temporarily convey the Foxwood Inn to Roy so he could get married, and so she quit claimed the Foxwood Inn to Roy to provide his proof of means and ability to support a wife. Trustee's Ex. D. Roy returned from Russia with Elena in April 1999, and they were married in June 1999.

On June 15, 1999, Roy executed a quitclaim deed, Ex. E, conveying the Foxwood Inn back to Bernadean, for the sum of $1.00. She and Roy then approached the Bank for a loan, and proceeded to borrow from the Bank without disclosing to the Bank the existence of Ex. E, which was not recorded until February 1, 2002. Bernadean testified that the delay in recording Ex. E was caused by an error in the legal description[2], and Ex. E was not recorded until after she moved to Oklahoma.

Roy and Bernadean signed a promissory note to the Bank dated 11-12-1999, Ex. A, in the amount of $101,701.00, payable in 180 monthly payments of $1,160.68. Bernadean testified that the loan was to buy a "big red truck" for Roy to do long haul transport so he could make additional income and have flexibility. The note provides for events comprising default, including "(d) Any representation or statement made or furnished to Lender by Borrower or on Borrower's behalf is false or misleading in any material respect either now or at the time made or furnished." Under "Collateral" the note provides: "This note is secured by a Deed of Trust from

[2]The error in the legal description in Ex. E is the clause "thence West a distance of 440 feet", which should read "thence South a distance of 440 feet". Trustee's Ex. C, D; Bank's Ex. B, C. Ex. E was recorded with the error, but not until February 1, 2002. Prior to that, Bernadean testified that Ex. E sat in the Clerk and Recorder's office without being recorded.

Roy Shaun McCarty to Lender dated November 12, 1999." Bank's Ex. A.

Grove testified that he understood the loan was to Roy, and that he did not know of the borrowers' intent to transfer the Foxwood Inn, back to Bernadean, or the Bank would have structured the loan differently. Grove testified that the Bank would have considered approving a loan to Bernadean in its normal course, because she was the more solvent, but the Bank would have wanted to know more about the details of the transaction and agreement between Bernadean and Roy, and Roy's condition, if it had known that Bernadean and not Roy was the owner of the Foxwood Inn.

Instead of Bernadean, to whom the Foxwood Inn had been quit claimed by Ex. E, to secure repayment of the loan Roy executed Ex. B, a deed of trust whereby Roy granted the Bank the Foxwood Inn as security. Bernadean testified that she knew at the time she executed Bank's Ex. A that Roy was the record owner but not the real owner because of Ex. E quit claiming the Foxwood Inn back to her, and admitted that she did not tell the Bank's president Grove about Ex. E. She also admitted that she did not notify the Bank or get its consent when she recorded either quitclaim deed Ex. E or Bank's Ex. C. Grove testified that the borrowers did not disclose the quit claim deeds to the Bank, and that the Bank would not have approved the loan if it had known of the quitclaim deed to Bernadean, to which the Bank did not consent.

At page 2, the deed of trust Ex. B contains a due on sale clause which gave the Bank the option to declare the sums secured by Ex. B immediately due and payable upon the sale of all or part of its security without its written consent. Among the Bank's remedies under Ex. B is the right to foreclosure by notice and sale, and the right to recover costs and attorney's fees. Lastly, Roy acknowledged that the real property securing the Bank's loan is not exempt from execution

as a homestead, at page 5 of Ex. B. Bank's Ex. B was recorded on November 12, 1999.

Bernadean moved to Colorado where she lived until April 2002, when she moved to Oklahoma. She testified that Roy ran the Foxwood Inn while she was away. Roy bought the truck with the loan proceeds, but had an accident and totaled it in November of 2002. The truck was insured, and part of the proceeds went to Roy and part to the Bank. Bernadean did not know where the rest of the proceeds went, but testified that they were not applied against the Bank's loan.

Grove testified that the Bank learned of the quitclaim deeds after it started foreclosure in July 2003, when it learned from the title report that the Foxwood Inn was owned by Bernadean. Bernadean testified that in August of 2003 she was contacted by an employee of the Bank named Chris, who had learned of the recordation of the quitclaim deed, Ex. E. Bernadean moved back to White Sulfur Springs in October 2003 and lived in the Foxwood Inn. She testified that at the Bank's suggestion she listed the Foxwood Inn for sale, and applied for other loans because she was aware that the loan from the Bank was in default. She listed the property for sale in November of 2003 at a price of $330,000, based on an appraisal which came in at $320,000. Bernadean testified that in her opinion the Foxwood Inn has a current market value of $330,000[3] based on that appraisal, and she claims to have an equity in the approximate amount of $200,000.

The Foxwood Inn has been listed for sale with the current realtor since May of 2004 at $330,000, but had no showings or interested buyers and received no offers. Notwithstanding,

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[3]Grove testified that the Foxwood Inn is worth $180,000. The Court assigns no probative weight to Grove's opinion. The Bank failed to obtain an appraisal from a licensed real estate appraiser, and failed to establish adequate foundation for Grove to give an opinion on the value of that property. The Debtor, by contrast, has the right to testify as to her opinion of the value of her own property. *In re Plummer*, 20 Mont. B.R. 468, 478 (Bankr. D. Mont. 2003)

Bernadean testified that no risk exists to the Bank or other creditors because of the amount of equity.

Bernadean admitted that she is 2 years in arrears in payments owed to the Bank under Bank's Ex. A, the promissory note. She admitted that she received notices of default from the Bank sent to her, and that by the Summer of 2004 the Bank had started foreclosure proceedings and Bernadean received notice of a trustee's sale of the Foxwood Inn scheduled for September 9, 2004. Grove testified that no one expressed interest in purchasing the Foxwood Inn to the Bank during the notice period leading up to the date of trustee's sale.

On September 8, 2004, without the Bank's knowledge or consent and the day before the trustee's sale, Roy executed another quitclaim deed, Bank's Ex. C, quit claiming unto Bernadean the Foxwood Inn. That quitclaim deed was recorded September 8, 2004, the same date Bernadean signed a declaration of homestead declaration, Ex. D, claiming a homestead exemption in the Foxwood Inn. The following day, the date for the trustee's sale, Bernadean filed her Chapter 13 petition on September 9, 2004. Bernadean testified that she filed her petition to buy a little more time, otherwise the Foxwood Inn would have been sold on the courthouse steps. Grove testified that on the petition date the Bank's claim was in the amount of $113,845.50, and accrues interest at 10.9%. The arrears on September 9, 2004, were $28,790.28, and Grove testified that since the petition date four more missed payments totaling $4,642.72 have accrued raising the arrearage to $34,433.00 as of the date of trial.

Bernadean filed her Schedules and Plan on September 23, 2004. Schedule A lists the Foxwood Inn property at a current market value of $320,000 secured by a claim in the amount stated of $117,573.32, which she claims under a homestead exemption on Schedule C. Schedule

B lists a total of $25,589.52 in personal property, including a checking account at Home National Bank[4] in Ponca City, Oklahoma, with a balance of $892.57, but does not list the Foxwood Inn's checking account at Valley Bank of Helena ("Valley Bank"). Bernadean testified she used to be and thought she was an authorized signatory for the Valley Bank account, but that she did not list it on Schedule B because she did not consider it her personal account. She testified that her name has been taken off of the Foxwood Inn's Valley Bank account, where the revenues of the Foxwood Inn are deposited and from which its expenses are paid.

Bernadean's original Schedule B does not include any debt owed to her by Roy. The Bank is listed on Schedule D as a secured creditor in the amount of $117,573.32[5]. Schedule F lists $12,841.91 in unsecured claims. Schedule G does not list an executory contract with Roy. Bernadean testified they did not have a written agreement for Roy to operate the Foxwood Inn bed and breakfast. They have only an oral understanding. Schedule H does not list Roy or any other codebtors, despite the Bank's promissory note signed by both Roy and Bernadean which remains unpaid.

Schedule I lists $5,671.34 in monthly income, including an estimated $3,412.17 in

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[4]Trustee's Ex. A are bank statements from the Home National Bank checking account, which is in Bernadean's name and her daughter Lisa Mansfield's.

[5]The Bank files Proofs of Claim Nos. 4 and 5 on October 20, 2004, and December 8, 2004, respectively. Both of the Bank's Proofs of Claim list the amount of its claim as $113,845.50. Proof of Claim No. 5 changes the value of the Foxwood Inn to $180,000 from $210,000 on No. 4. No objection has been filed to the Bank's Proofs of Claim. The Court notes that Bernadean did not sign the Deed of Trust, Bank's Ex. B, even though she signed the promissory note Ex. A.

income from the "B&B Inc[6]." Schedule J lists monthly expenses of $5,472.04, with no rent or mortgage payment included but $1,000 for food and $201.96 for a trailer payment, and $1,671 in business expenses which are not itemized.

Debtor's Plan provides for $200 monthly payments for 36 months, and a $200,000 lump sum payment in the 36th month to be funded when Debtor "will sell her business as a going concern." Bernadean testified that the 36 month provision could be what she meant when she said she filed her bankruptcy to buy "a little more time", and that her attorney chose 36 months. She testified she would sell the Foxwood Inn immediately if she could. Grove testified that while the residential real estate market in White Sulphur Springs generally is good, the Foxwood Inn will be difficult to market as a business because of its nature as a tourist-type business, because a new Comfort Inn has located in town to compete for tourist business.

The Bank is treated in the Plan as having an impaired secured claim. Unsecured claims are provided for a distribution of at least $12,000.00. Grove testified that because of the Plan provision for no payments of up to 3 years, bank regulations would force the Bank to reclassify the loan quality and downgrade the loan, charging off part of it and taking a loss against the Bank's income and collateral. Grove further testified that because of the quitclaim deeds the Bank faces a serious title problem.

Berndean admitted she owes the Bank's claim, that there were 21 missed payments to the Bank as of the petition date, and did not dispute that the Bank's attorney's fees, costs and late charges total $28,790.28. She further admitted that she is in postpetition default to the Bank of

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[6]Caughron clarified during the hearing that the reference to "Inc." meant income, not a corporation.

four months, but testified that the Bank wanted payment of its entire claim and would not accept payments. She testified that the Foxwood Inn is losing money, and that she does not see it making any profit during the 36 month term of the Plan, or in the future. When questioned by Guthals why she does not close the bed and breakfast to stop losing money, Berndean testified that her pension is not enough to buy propane for the house. Grove testified that the Bank feels it is at risk even if equity exists because of the 3-year term for liquidation, and because it does not feel Bernadean can maintain the property properly for that long.

The meeting of creditors pursuant to 11 U.S.C. § 341(a) was held on October 14, 2004, and continued to November 17, 2004. The Trustee and Bank filed their motions to convert or dismiss prior to the continued § 341(a) meeting. The Trustee filed his first motion to convert on November 10, 2004, alleging Bernadean is engaging in insider dealing with her son Roy, who controls the account at Valley Bank where the bed and breakfast receipts are deposited.

The Bank filed its motions to dismiss and to modify stay on November 13, 2004. The Bank joined the Trustee's motions to convert, and further contended the petition was filed in bad faith. The Bank's motion to modify stay was based upon both § 362(d)(1) for "cause" and § 362(d)(2).

After the § 341(a) meeting, at the Trustee's instruction Bernadean amended some of her Schedules on November 16, 2004, and filed amended Schedules A, B, D, H, I, J, and Statement of Financial Affairs again on November 22, 2004. Bernadean testified that her Schedules are now complete, with the only exception being an error on her Statement of Financial Affairs where her pension income for 2002 is overstated. It states at paragraph 2 that her 2002 pension is $35,399, which she states overstates her pension. Bernadean testified she should ask her attorney

Caughron about that entry, but no further amendment was filed. Later however, under questioning by the Bank's attorney, Bernadean admitted that her Schedules and Statement of Financial Affairs remain incomplete.

Debtor's Amended Schedule B still does not list the Foxwood Inn account at Valley Bank, even though Bernadean owns the Foxwood Inn and lists its income and expenses in her Schedules. Paragraph 17 of amended Schedule B lists an estimated claim of $145,000 against Roy "for unpaid personal loans". When questioned by the Trustee why Roy's debt was not listed originally Bernadean testified it was due to "plain ignorance". Bernadean testified that she forgot about Roy's debt to her because most of it was the Bank loan that Roy owed, and part is from when she paid off Roy's pickup truck. Under examination by Bank's counsel, Bernadean testified that she is "sure there's more" owed to her by Roy than $145,000, but that she does not have the information to go back and check the complete amount. Under questioning by Caughron, Bernadean testified that the $145,000 consists of the Bank's Proof of Claim amount, plus two-thirds of the loan amount for the pickup truck and another $5,000.

Amended Schedule H lists Roy as a codebtor, but Schedule G was not amended to disclose their operating agreement for the bed and breakfast. Schedule I was amended to increase her income to $5,718.18 with no change to the B&B income. Under examination by the Trustee, however, Bernadean testified that she does not in fact receive the $3,412.17 listed on Schedule I, or any income from the bed and breakfast business. Schedule J was amended to reduce her expenses to $5,322.04 but continues to list $1,671 in business expenses without any itemization as requested by the Trustee. Bernadean testified that she believes her attorney Caughron has the itemized statement for the $1,671 business expenses, but none has been filed or

admitted into evidence. She testified she discussed an itemized statement with Caughron and gave him an accounting, but that she did not later see it or sign it.

Despite the income and expenses listed on amended Schedules I and J, Bernadean testified that the business expenses of the bed and breakfast always seem to exceed the income. In addition to business expenses, Bernadean testified that she gives Roy financial assistance to pay utilities and buy groceries for the bed and breakfast, and his personal expenses. She uses her social security income to subsidize the business, and she testified that that subsidy continues today.

Trustee's Ex. A corroborates Bernadean's subsidization of the bed and breakfast. Trustee's Ex. A are bank statements from Home National Bank, including copies of checks written by Bernadean to the Foxwood Inn and to Roy which run to several thousands of dollars.[7] Bernadean testified that she wrote checks from her Home National Bank account to pay real property taxes, and checks to the Foxwood Inn account which would be deposited in the Valley

[7]Trustee's Ex. A includes check #1514 for $440 written to Foxwood Inn on 10-21-03; #1523 for $500 and #1525 for $100.00 both written to Foxwood Inn on 11-4-03; #1533 and 1534 in the amounts of $1,245.24 and $2,331.13 on 11-8-03; #1542 for $2,090.00 to Foxwood Inn on 11-17-03; #1544 for $800.00 to Foxwood Inn on 11-24-03; #1562 for $850.00 to Roy on 12-8-03; #1564 for $350.00 to Roy on 12-13-03; #1569 for $162.78 to Roy on 12-16-03; # 1570 for $156.90 to Foxwood Inn on 12-16-03; #1581 for $20.00 to Foxwood Inn on 1-6-04; #1590 for $1,116.00 to Foxwood Inn on 1-10-2004; #1592 for $50.00 to Foxwood Inn on 1-13-04; 1602 for $350.00 to Foxwood Inn on 1-2-04; #1607 for $500.00 to Foxwood Inn on 1-27-04; #1624 for $20.00 to Roy on 2-11-04; #1629 for $75.00 to Foxwood Inn on 2-18-04; #1638 for $130.00 to Roy on 3-1-04; #1648 for $400.00 to Foxwood Inn on 3-17-04; #1663 for $25.00 to Roy on 3-30-04; #1668 for $935.00 to Foxwood Inn on 4-2-04; #1678 for $760.00 to Foxwood Inn on 4-6-04; #1680 for $100.00 to Foxwood Inn on 4-8-04; #1687 for $3,147.00 to Foxwood Inn on 4-14-04; #1701 and 1702 for $500.00 and $50.00, respectively, on 4-30-04; #1731 for $50.00 to Foxwood Inn on 5-31-04; #1758 for $100.00 to Roy on 7-12-04; #1779 for $100.00 to Foxwood Inn on 8-10-04; #1813 for $50.00 to Foxwood Inn on 9-11-04; #1832 for $485.00 to Foxwood Inn on 10-4-04; #1846 for $769.00 to Foxwood Inn on 10-10-04; and #1851 for $125.00 to Foxwood Inn on 10-18-04.

Bank account which Roy uses to pay both for bed and breakfast expenses and Roy's personal debts. Check #1849 to Meagher County Treasurer in the amount of $653.71 was for license plates on Roy's pickup which he did not pay.

The Amended Statement of Financial Affairs, at question 10 requiring the Debtor to list "all other property" transferred within 1 year of the commencement of the case, lists a $35,000 transfer to Roy and Elena to pay off a loan on a pickup for which Bernadean was jointly liable[8], but does not list any of the transfers from Bernadean to Roy and to the Foxwood Inn account controlled by Roy shown by Trustee's Ex. A listed above. Under examination by the Trustee, Bernadean testified that the transfers to Roy shown by Ex. A were not property, they were just checks written to him and so were not listed at question 10. Bernadean differentiated the transfer of $35,000 for the pickup which is listed at question 10 because that was for a piece of property. The Court finds Bernadean's explanation to be without merit, and finds Bernadean's testimony and explanation of her failure to list the transfers to Roy and the Foxwood Inn shown by Ex. A on question 10 of the amended Statement of Financial Affairs incredible and without any probative weight.

Question 3 of the amended Statement of Financial Affairs calls for payments to creditors aggregating more than $600 within 90 days. Under direct examination by the Trustee Bernadean admitted that she made payments to creditors within 90 days, and that she had no reason not to list such payments. When asked if she agreed question 3 was not answered accurately, Bernadean stated she would have to ask her attorney. Under questioning by her own attorney

[8]Bernadean testified she was being sued along with Roy and Elena over the pickup, which she owned a one-third interest in with Roy and Elena, and she paid the $35,000 to settle the lawsuit.

Bernadean testified that there were no payments to creditors within 90 days in excess of $600.

Ex. H are the Foxwood Inn bank statements from the Valley Bank account. Bernadean testified she does not help keep the Foxwood Inn's books. Ex. H shows that Bernadean's name is not on the Valley Bank account, only Roy's. She testified that her name used to be on the account but was taken off. Ex. H shows several checks written to fast food restaurants such as McDonald's, Hardee's and Taco Bell, to other restaurants such as Overland Express, Jaker's, Eddy's, and Bennigan's, and several checks to Town Pump and other gas stations, most of which are signed by Roy, but some signed by Elena McCarty[9]. Bernadean testified that checks written on the Foxwood Inn account to BSSI[10] were for Roy's wife Elena's schooling as a massage therapist. She admits that Roy uses revenue from the Foxwood Inn to pay his personal expenses for himself and his 2 children, and his wife's educational expenses, and that that is their arrangement in exchange for Roy's services since Roy does not earn a salary. Bernadean had no knowledge whether Roy turned over any business revenue or accounting to the Chapter 13 Trustee.

The Trustee filed his second motion to convert on November 29, 2004, based on Debtor's failure of her duty to turn over documents relating to property of the estate requested under 11 U.S.C. § 521(4). Bernadean filed responses in opposition to the motions to dismiss or convert and the Bank's motion to modify stay. At the hearing the Trustee advised the Court that the

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[9]The Court notes in particular checks written on the Foxwood Inn business account to Animal Center, Pet Co, and Cat Fancy. Ex. H.

[10]Ex. H shows checks written to BSSI including #5744 for $48.55 on 5-20-04; #5851 for $553.32 on 6-23-04; # 5926 for $276.78 on 7-14-04; #5988 for $276.66 on 8-23-04; and 6039 for $829.98 on 11-7-04.

Debtor had turned over some documents, but that she failed to turn over the requested breakdown of the $1,671 in business expenses listed on Debtor's Schedule J.

DISCUSSION

A. Contentions of the Parties.

The Trustee moved to convert originally based upon Bernadean's insider transactions with her son Roy and debts he owes her which were not revealed in her Schedules. The Trustee's second motion to convert contends Bernadean failed to comply with his directive to turn over deeds, business records and an itemization of the $1,671 in other business expenses. At hearing the Trustee argued that both motions to convert remain pending, and Bernadean has failed to turn over the itemization of the $1,671 in business expenses.

The Bank joined in the Trustee's motions, and further sought conversion or dismissal on the grounds Bernadean filed the instant Chapter 13 in bad faith to stop its trustee's sale and claims an interest in the Foxwood Inn based upon a quit claim deed from Roy which violates the provisions of its note and deed of trust, Bank's Ex. A and B. The Bank moves for relief from the stay based upon §§ 362(d)(1) and (d)(2) based upon a default of 21 monthly payments and late fees, and concealment of the transfer of the Foxwood Inn from Roy to Bernadean in violation of the deed of trust. The Trustee filed a consent to the Bank's motion to modify stay.

Bernadean objects to the Trustee's and Bank's motions to convert or dismiss. She contends that she has amended her Schedules and Statements in good faith and they are now complete to the best of her knowledge. She objects to the Bank's motion to modify stay based on § 362(d)(1) on the grounds the Bank is adequately protected by sufficient value of the Foxwood Inn during the pendency of her Plan, and contends that the property is necessary to her fresh start

and reorganization under § 362(d)(2)(B).

B. Conversion – Bad Faith.

The Trustee's motions seek conversion for Bernadean's undisclosed insider transactions with Roy and her failure to turn over an itemization of business expenses listed on Schedule J. The Bank's motion to convert or dismiss alleges her Chapter 13 case and Plan are filed in bad faith.

A debtor must file both her Chapter 13 petition and plan in good faith, and a lack of good faith or bad faith filing has been found to constitute cause for conversion or dismissal. *In re Fleury*, 294 B.R. 1, 5 (Bankr. D. Mass. 2003); *In re Dicey*, 312 B.R. 456, 458 (Bankr. D. N.H. 2004). The burden of proof is applied differently, because under 11 U.S.C. § 1307(c) seeking conversion the burden of proof is on the moving party, while under 11 U.S.C. § 1325(a) seeking confirmation the burden is on the debtor. *Dicey*, 312 B.R. at 458. In the instant case the burden of proof is on the Trustee and the Bank to prove bad faith.

To determine whether a whether a petition has been filed in bad faith courts are guided by the same standards used to determine whether a plan has been proposed in bad faith. *In re Gress*, 257 B.R. 563, 567, 19 Mont. B.R. 30, 34 (Bankr. D. Mont. 2000); *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In both instances the court must review the "totality of the circumstances". *Id.*; *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1124-25 (9th Cir. 1999); *Eisen*, 14 F.3d at 470 . In determining whether a petition or plan is filed in good faith the court must review the "totality of the circumstances". *Leavitt*, 171 F.3d at 1224-25; *Gress*, 257 B.R. at 567, 19 Mont. B.R. at 34-35; *Eisen*, 14 F.3d at 470; *In re Hungerford*, 19 Mont. B.R. 103, 130 (Bankr.D. Mont. 2001).

A finding of bad faith does not require fraudulent intent by the debtor. *Leavitt*,

171 F.3d at 1224; *Hungerford*, 19 Mont. B.R. at 130; *Gress*, 257 B.R. at 568. This Court noted in *Gress*:

> [N]either malice nor actual fraud is required to find a lack of good faith. The bankruptcy judge is not required to have evidence of debtor illwill directed at creditors, or that debtor was affirmatively attempting to violate the law-malfeasance is not a prerequisite to bad faith.
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> *In re Powers*, 135 B.R. 980, 994 (Bankr.C.D.Cal.1991) (relying on *In re Waldron*, 785 F.2d 936, 941 (11th Cir.1986)).
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> The determination of whether a debtor filed a petition or plan in bad faith so as to justify dismissal for cause is left to the sound discretion of the bankruptcy court. *In re Leavitt*, 171 F.3d at 1222-23; *In re Marsch*, 36 F.3d 825, 828 (9th Cir.1994); *Greatwood v. United States (In re Greatwood)*, 194 B.R. 637, 639 (9th Cir. BAP 1996), aff'd, 120 F.3d 268 (9th Cir.1997).
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> The same factors govern whether Gress filed his petition or his plans in bad faith. *In re Eisen*, 14 F.3d at 470; *In re Leavitt*, 171 F.3d at 1224.

Gress, 257 B.R. at 568, 19 Mont. B.R. at 35.

In *Leavitt*, 171 F.3d at 1224, the Ninth Circuit held that in determining whether a chapter 13 petition plan was proposed in good faith, a bankruptcy court should consider: (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Code, or otherwise filed his petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor intended to defeat state court litigation; and (4) whether egregious behavior is present. *See also Ho v. Dowell (In re Ho)*, 274 B.R. 867, 876 (9th Cir. BAP 2002).

In addition to being grounds for denial of confirmation, bad faith is "cause" for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c), even though not specifically listed. *Gress*, 257 B.R. at 567; *Leavitt*, 171 F.3d at 1224; *Eisen*, 14 F.3d at 470 ("A

Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c)."). The Trustee's motions seek conversion, while the Bank's motion seeks conversion or dismissal. Under the above authority this Court has the discretion to convert or dismiss. After application of the *Leavitt* factors to the evidence in this case, the Court concludes that Bernadean filed her petition in bad faith, and that the circumstances shown by the record warrant immediate conversion of this case to a case under Chapter 7.

The first *Leavitt* factor is whether the debtor misrepresented facts in her petition or plan, unfairly manipulated the Code, or otherwise filed her petition or plan in an inequitable manner. The Court finds that the Trustee has satisfied his burden of proof to show that the first *Leavitt* factor shows bad faith by a heavy preponderance of the evidence.

The Debtor's original Schedules omitted her claim against Roy from Schedule B, which after her real property is the largest asset in absolute terms, and by far the largest asset after deducting the Bank's allowed secured claim. While she amended Schedule B to list her claim against Roy at $145,000, she testified at hearing under oath that she is sure there is more Roy owes her. She failed to list the Foxwood Inn's bank account at Valley Bank in Schedule B, even after amendment, although it is uncontroverted that she owns the Foxwood Inn and the Valley Bank account is its business account. Her Schedule I states her income from the Foxwood Inn bed and breakfast as $3,412.17, after amendment, but she testified that she does not receive that income, and there is no accounting in the record. She failed to include an itemization of the $1,671.00 of business expenses in her Schedule J after amendment, despite the Trustee's demand. On her original Statement of Financial Affairs Bernadean failed to list at question 10 the transfer of $35,000 to Roy and Elena to pay off the pickup loan and failed to list all the

transfers of property to Roy and the Foxwood Inn from her checking account at Home National Bank, Trustee's Ex. A, listed above at n.7, totaling several thousand dollars.

The Debtor has a right to amend her Schedules under F.R.B.P. 1009(a), and amendment is liberally allowed as a matter of course at any time before a case is closed under Rule 1009(a). *In re Michael*, 17 Mont. B.R. 192, 198 (9th Cir. 1998) (citing cases). However, amendment may be denied on a showing of a debtor's bad faith. *Id.*; *In re Magallanes*, 96 B.R. 253, 255-56 (9th Cir. BAP 1988). A debtor is required under F.R.B.P. 1007(b)(1) to file schedules of assets and liabilities, income and expenses, and a statement of financial affairs, prepared as prescribed by the appropriate official forms, under penalty of perjury. A debtor seeking the benefits of Chapter 13 must also carry its burdens. The general right to amend under Rule 1009(a) alone does not excuse misrepresentations and omissions in Schedules signed under penalty of perjury and submitted to the Court.

The Court finds that Bernadean misrepresented facts in her Schedules and Statement of Financial Affairs by omitting one of her largest assets – her claim against Roy, based upon her failure to list the Foxwood Inn business account at Valley Bank on Schedule B, by listing of $3,412.17 in bed and breakfast income on Schedule I when she testified she receives none of it, her failure to provide the Trustee with an itemization of the $1,671 business expenses on Schedule J, and her failure to list the $35,000 transfer to Roy and Elena and the transfers to Roy and Elena shown by Trustee's Ex. A from her personal checking account. Even after two amendments, her Schedules still omit the Foxwood Inn account at Valley Bank and the transfers to Roy shown by Ex. A, and she has not provided the Trustee with an itemization of the $1,671 business expenses on Schedule J.

Bernadean's excuse that she failed to schedule her claim against Roy due to ignorance is not a sufficient excuse. Bernadean is represented by an attorney, and so she "can be charged with constructive knowledge of the law's requirements." *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir.1987). Since she is charged with constructive knowledge of the law, Bernadean's explanation that she did not list her claim against Roy, or the dozens of transfers to Roy and the Foxwood Inn shown by Trustee's Ex. A on her amended Statement of Financial Affairs, question10, which she said was not transfers of property, is without merit. The latter excuse is even further undermined by her amendment to add the $35,000 transfer of property to Roy and Elena on her amended Statement of Financial Affairs, question10, to settle the claim against her. If she included that transfer of funds, she is charged with knowledge that the dozens of transfers of property to Roy and the Foxwood Inn shown by Trustee's Ex. A, n.7 *ante*, were required to be listed on her amended Statement of Financial Affairs at question10 along with "all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred".

Bernadean suggested that the checks written to Roy and the Foxwood Inn on Trustee's Ex. A to pay his personal and family expenses were the way they had always operated. The Court rejects the suggestion that such transfers did not have to be disclosed at question 10 because they were transferred in the ordinary course of the business or financial affairs of the Debtor. Roy's fast food and restaurant bills, gasoline, Elena's massage therapist training classes, and their pet supply bills were not shown to be part of the ordinary course of business of a bed and breakfast business. Bernadean failed to disclose her support of Roy and the fact that the proceeds from her business were flowing to an undisclosed account out of her control or the

control of the estate, which this Court finds as evidence of bad faith.

With respect to the itemization of $1,671 in business expenses requested by the Trustee, Bernadean testified that she gave that information to her attorney. However, the Trustee represented to the Court that no itemization has been provided, and none is in the record. The Debtor cannot escape the effect of her failure to correct omissions by blaming her attorney. Bernadean voluntarily selected Caughron as her attorney of record, and she cannot now avoid the consequences of the acts or omissions of her freely-selected attorney if indeed she did give him the demanded itemization. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993); *Link v. Wabash Co.*, 370 U.S. 626, 633-34 (1962); *In re Casey*, 193 B.R. 942, 949 (Bankr. S.D. Cal. 1996).

In *Leavitt* the court found the first bad faith factor of misrepresentation and inequitable manipulation of the Code by the debtor's failure to fully disclose his assets and financial dealings. 171 F.3d at 1225. In the instant case Bernadean failed to fully disclose her assets and business account, and her financial dealings with her son who she supported before and during this case with income from estate property. As in *Leavitt* Bernadean made corrections only after demands by the Trustee and motions to dismiss were filed. Given the number of financial dealings, the value of assets omitted and the size of the undisclosed transfers of property to her son, as in *Leavitt* those omissions cannot be considered innocent. 171 F.3d at 1225. The Court finds that the first bad faith factor is shown by a preponderance of credible evidence.

The second bad faith *Leavitt* factor is the debtor's history of filings and dismissals. There is no evidence or record of Bernadean's filing a prior bankruptcy case in this District, and so the

second factor is not shown.

The third *Leavitt* factor is whether the debtor intended to defeat state court litigation. No evidence exists in the record of any state court litigation. But, the evidence shows that the Bank had initiated foreclosure proceedings under its default provisions of the deed of trust, Bank's Ex. B, and Bernadean filed her petition on the day of the foreclosure sale with the expressed purpose to buy a little more time. By itself, filing a bankruptcy petition with the intent to frustrate creditors on the eve of foreclosure does not establish bad faith or an absence of intent to seek rehabilitation. *In re Marshall*, 298 B.R. 670, 681 (Bankr. C.D. Cal. 2003), quoting *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indust. Terminal, Inc.)*, 931 F.2d 222, 228 (2d Cir.1991) (citations omitted) (finding that chapter 11 bankruptcy petition was not frivolous when it was filed). This Court will not find bad faith based upon Bernadean's filing of her petition on the date of the foreclosure sale, but the Court will consider it among the totality of the circumstances. The third *Leavitt* factor is not proven.

Fourth, the Court considers whether egregious behavior is present. In making this determination the Court considers the Debtor's prepetition conduct as well as her postpetition conduct. *In re Pickering*, 195 B.R. 759, 765 (Bankr.D.Mont.1996), citing *In Neufeld v. Freeman*, 794 F.2d 149, 152-53 (4th Cir.1986); *see also In re Solomon*, 67 F.3d 1128, 1134 (4th Cir. 1995).

The Court finds egregious behavior by Bernadean present both prepetition and post petition. Prepetition, Bernadean's failure to disclose to the Bank the quitclaim deeds to and from her son Roy at the time she entered into the promissory note, Bank's Ex. A, which provided several events of default, including "(d) Any representation or statement made or furnished to

Lender by Borrower or on Borrower's behalf is false or misleading in any material respect either now or at the time made or furnished." Bernadean admits not telling the Bank about her renewed ownership of the Foxwood Inn at the time she signed the promissory note, Bank's Ex. A, and allowed Roy to sign the deed of trust, Bank's Ex. B, knowing she was the owner constitutes egregious conduct. Grove testified that because of the quitclaim deeds and Bernadean's failure to disclose her interest the Bank faces a serious title problem, and the Court finds that testimony credible and Bernadean's failure to disclose her ownership interest egregious. Bernadean provided no explanation or justification for her conduct. Furthermore it was unnecessary because Grove admitted she was more solvent than Roy and the Bank would have considered the loan application with her as owner.

The Court finds additional egregious conduct by Bernadean in her failure to disclose the business account at Valley Bank of Helena, and her transfers to Roy and Foxwood in Trustee's Ex. A of several thousand dollars. While this evidence supported a showing of the first *Leavitt* factor, this Court considers it egregious conduct also under the fourth factor. Bernadean allowed her son to collect the revenue from her business, without any accounting for the revenues. After the petition was filed this continued, and estate property including Bernadean's earnings under 11 U.S.C. § 1306(a) were diverted from payments to creditors to the use of her largest debtor, her son Roy, with no accountability to her or to the estate. The Court acknowledges Bernadean's desire to provide for her son and her family, but after she filed her petition she had burdens under the Bankruptcy Code which she egregiously violated when she failed to disclose the business account at Valley Bank or Roy's debt, and failed to disclose her transfers to Roy and the business.

In addition, the Court finds further egregious behavior by Bernadean's failure to comply with the Trustee's demand for an itemization of $1,671 in business expenses listed on Schedule J. Schedule J, both the Official Form and the form used in both Bernadean's original and amended Schedule J, plainly states in parentheses "(attach detailed statement)" of regular expenses from operation of business, profession, or farm. Bernadean failed to provide the itemization of the $1,671 in business expenses listed on her Schedule J despite the Trustee's demand. The Court finds such failure egregious conduct.

Based upon the above conclusions that bad faith is shown, after consideration, by two out of the four *Leavitt* factors by a preponderance of the evidence, the Court finds and concludes that Bernadean filed her Chapter 13 petition in bad faith. The Court has the discretion to dismiss this case with prejudice and a permanent bar from refiling a bankruptcy petition, or to convert this case to a case under Chapter 7. *Gress*, 257 B.R. at 568. Section 1307(c) provides that a court may dismiss or convert a case to a case under Chapter 7, "whichever is in the best interests of creditors and the estate".

The Court exercises its discretion by converting this case to a case under Chapter 7. In the Court's view dismissal would not be in the best interests of creditors, particularly the Bank, because Bernadean has demonstrated that she will make false and misleading statements and frustrate the Bank's rights to enforce its promissory note and deed of trust. By conversion of this case to Chapter 7, as discussed below the Bank will have the right to proceed with its foreclosure remedies, and the other creditors' interests will be protected by a Chapter 7 Trustee who will have the ability to investigate this matter and file a response and request for relief if the trustee believes equity exists in the estate property providing a distribution for creditors. In addition

dismissal will not benefit the creditors as much as conversion because Bernadean disbursed her income and estate property to her son Roy and her family before and after the petition date instead of committing it to plan payments to her creditors. A Chapter 7 Trustee will have the power to investigate Bernadean's dealings with Roy and possibly recover estate property for the benefit of creditors.

In sum, the Court finds and concludes that conversion of this case is in the best interests of creditors and the estate based upon the Debtor's bad faith. The motions to convert shall be granted.

C. Bank's Motion to Modify Stay.

The Bank moves to modify the stay to proceed with its foreclosure against the Foxwood Inn based upon both § 362(d)(1) for "cause" and under § 362(d)(2). Under 11 U.S.C. § 362(g), a creditor has the burden of proving that a debtor does not have equity in property, while the debtor has the burden of proof on all other issues to show that the stay should not be modified, including adequate protection. *See First Interstate Bank of Billings v. Interstate Distrib. Co., Inc. (In re Interstate Distributing Co., Inc.)*, 13 Mont. B.R. 86, 89 (D. Mont. 1993) (recognizing that the burden of proof on the issue of adequate protection is on the debtor); *In re Mittlestadt* , 20 Mont. B.R. 46, 52 (Bankr. D. Mont. 2002); *Hungerford* , 19 Mont. B.R. at 133-34; *In re National Environmental Waste* Corp., 191 B.R. 832, 836 (Bankr. C.D. Cal. 1996), *aff'd*, 129 F.3d 1052 (9th Cir. 1997); *In re Syed*, 238 B.R. 126, 132 (Bankr. N.D. Ill. 1999); *In re Sauk Steel Co., Inc.*, 133 B.R. 431, 436 (Bankr.N.D.Ill.1991); 11 U.S.C. § 362(g)(2). With conversion of this case to Chapter 7 the Debtor's effective reorganization is no longer at issue and the Bank's motion based

upon § 362(d)(2) is moot, leaving Bank's § 362(d)(1) motion to modify stay for cause[11]. The burden of proof in this § 362(d)(1) contested matter is on Bernadean to show that relief from the stay should not be granted.

The Bank seeks relief from the stay for cause based upon the Debtor's admitted pre- and postpetition defaults, her bad faith filing of the petition and plan, and her false and misleading failure to disclose her ownership of the Foxwood Inn when she executed the promissory note, Bank's Ex. A, and stood by silently while Roy and not she executed the deed of trust, Ex. B. Bernadean contends that substantial equity exists in the Foxwood Inn which is her homestead.

> Under 11 U.S.C. § 362(a), "[a] bankruptcy filing imposes an automatic stay of all litigation against the debtor." *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990) (citing 11 U.S.C. § 362(a)), except in those cases specifically enumerated in § 362(b). The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives debtors a breathing spell from creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits debtors to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove them into bankruptcy. S.Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5840-41.

In re Mittlestadt, 20 Mont. B.R. at 51 (quoting *In re Westco Energy, Inc.*, 18 Mont. B.R. 199, 211-12 (Bankr. D. Mont. 2000)).

Section 362(d)(1) allows for the granting of relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest[.]" This Court explained the standard for modifying the stay for "cause" under § 362(d)(1) in *Westco*:

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[11]Also because of conversion to Chapter 7, the Court need not take up whether Bernadean's Plan satisfies the requirements for "cure by sale" of a default authorized in *In re Siegfried*, 16 Mont. B.R. 289, 300 (Bankr. D. Mont. 1997); *In re Murphy-Reyner*, 19 Mont. B.R. 141 (D. Mont. 2001).

> Section 362(d), however, provides that, "[on request of a party in interest and after notice and a hearing, the court shall grant relief from the [automatic] stay" in three instances. The subsection relevant to these proceedings is § 362(d)(1), which allows for the granting of relief from the automatic stay "for cause".[12] What constitutes cause for purposes of § 362(d) "has no clear definition and is determined on a case-by-case basis." *Tucson Estates*, 912 F.2d at 1166. *See also Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In the Matter of Little Creek Dev. Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (Relief from the automatic stay may "be granted 'for cause,' a term not defined in the statute so as to afford flexibility to the bankruptcy courts.").

Westco, 18 Mont. B.R. at 211-12.

Section 362 vests this Court with wide latitude in granting appropriate relief from the automatic stay, and a decision to lift the automatic stay is within a bankruptcy court's discretion, and subject to review for an abuse of discretion. *In re Delaney-Morin*, 304 B.R. 365, 369-70 (9th Cir. BAP 2003); *In re Leisure Corp.*, 234 B.R. 916, 920 (9th Cir. BAP 1999); *Plummer*, 20 Mont. B.R. at 477-78; *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 107, 108-109 (9th Cir. 1995).

Lack of adequate protection is but one example of cause for relief from stay. *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985); *In re Avila,* 311 B.R. 81, 83 (Bankr. N.D. Cal. 2004). An equity cushion may provide adequate protection although not a single mortgage payment has been made. *Avila,* 311 B.R. at 83; *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir.1984). In *Avila* the court found the mortgagee was adequately protected by an equity cushion of 40%. 311 B.R. at 83. The court noted that "[w]here a creditor is adequately protected by a large equity cushion,

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[12] Section 362(d)(1) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section , such as by terminating, annulling, modifying, or conditioning such stay–
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest[.]

the debtor would suffer a substantial loss in the event of foreclosure, and no economic harm to the creditor would result, relief from stay should not automatically follow a default in payment." *Avila,* 311 B.R. at 84; *see In re McCollum*, 76 B.R. 797, 799 (Bankr. D. Or.1987).

In the instant case the Chapter 13 Trustee filed a consent to the Bank's motion to modify stay. With the conversion of this case, although the Court will allow the Chapter 7 Trustee an opportunity to investigate and request relief, this Court finds adequate cause shown to lift the stay based upon the Debtor's bad faith and admitted pre- and post-petition default. The Debtor had an opportunity to list the property and expose it to the market for an extended period of time, but received no offers or even showings. Granting relief from the stay will permit the Bank to resume its foreclosure, and the Chapter 7 Trustee will have the opportunity to investigate for the interests of the other creditors and request relief.

The Court finds and concludes that Bernadean failed to satisfy her burden of proof that the Bank's motion should not be granted for cause. Her desire to retain possession of the Foxwood Inn to provide employment for her son, even when she admits it is losing money and likely will lose money in the future and she cannot even afford to pay for gas to heat the property, is not adequate reason to deny the Bank relief from the stay when the evidence shows substantial pre- and postpetition defaults, bad faith, and a lack of interest by purchasers after exposure to the market.

The Court further finds that Bernadean will not suffer a substantial loss in the event of foreclosure. Her valuation of the Foxwood Inn was not borne out after exposure to the market. Granting relief from the automatic stay returns the parties to the legal position which they enjoyed prior to the imposition of the stay. *In re Johnson*, 17 Mont. B.R. 318, 319 (Bankr. D.

Mont. 1999); *Estate of B.J. McAdams v. Ralston Purina Co.*, 154 B.R. 809, 812 (N.D. Ga. 1993). Thus, while the Court has flexibility in determining whether to grant the Bank's motion for relief from the stay, by granting the motion Bernadean retains whatever claims and remedies she may have against the Bank in a nonbankruptcy forum.

For the reasons set forth above, because Bernadean failed her burden of proof to show that relief from the stay should not be granted, the Court exercises its broad discretion and grants the Bank's motion to modify stay based upon § 362(d)(1). *Mataya v. Kissinger*, 72 F.3d at 108-109. The Bank shall be authorized to proceed to enforce its rights under the deed of trust covering the real property at 52 Miller Road in White Sulphur Springs, under applicable nonbankruptcy law. Bernadean is free to raise her arguments, claims, and other defenses to foreclosure under applicable nonbankruptcy law.

CONCLUSIONS OF LAW

1. This Court has original and exclusive jurisdiction over this Chapter 11 bankruptcy case under 28 U.S.C. § 1334(a).

2. The Chapter 13 Trustee's motions to convert and the Bank's motions to dismiss or convert and to modify stay are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (G).

3. The Trustee and Bank satisfied their burdens of proof under 11 U.S.C. § 1307(c) that cause exists to convert this case to a case under Chapter 7 based upon the Debtor's bad faith filing of her Chapter 13 petition, and conversion to Chapter 7 is in the best interests of creditors and the estate.

4. The Debtor failed to satisfy her burden of proof under 11 U.S.C. §§ 362(d)(1) & (g)(2) to show that relief from the automatic stay should not be granted.

IT IS ORDERED a separate Order shall be entered overruling the Debtor's objections, granting the Trustee's and Bank's motions to convert and converting this case to a case under Chapter 7 of the Bankruptcy Code; and in addition granting the Bank's motion to modify stay filed November 15, 2004, modifying the stay and authorizing the Bank to pursue its nonbankruptcy remedies in the following described real property located at 52 Miller Road, White Sulphur Springs, Meagher County, Montana, and more particularly described as, to wit:

> Beginning at the Southeast corner of the Southwest Quarter of the Northwest Quarter of Section 13, Township 9 North, Range 6 East, M.P.M., Meagher County, Montana, being a point of the County road, running thence North along the East boundary of said SW1/4NW1/4 a distance of 440 feet; thence West a distance of 240 feet; thence South a distance of 440 feet; thence East along a South boundary of said SW1/4NW1/4 a distance of 240 feet to the place of beginning;

and pursuant to F.R.B.P. 4001(a)(3) the relief from the stay granted the Bank will be stayed ten (10) days to give the Chapter 7 Trustee appointed in this case an opportunity to investigate and file a response and request for relief from this Order granting the Bank's motion.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana